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IN THE

Supreme Court of the United States

October Term, 1929.

No. 428

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

ANALYSIS OF AND REPLY TO THE RESPONDENT'S BRIEF

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1. It has been heretofore agreed by Petitioners that the inclusion of an estate by the entirety in the gross estate of a decedent is the intention of Congress in the controlling provisions of the 1916 and 1917 Acts.

2. If Congress had the power under the Constitution to do this, that power must be based on its right to impose an excise tax on a transfer. Petitioners, of course, agree that Congress has such a right and by these Acts no apportionment of the tax was attempted, as would be necessary if the tax is anything other than an excise tax.

3. Respondent on page 5 of its brief admits that "neither the title nor the estate of the survivor was created by the death of the decedent." Doubtless respondent will go further and admit, as all the authorities hold, that the title and estate of the survivor were created on the day the estate by the entirety first came into existence.

4. Respondent contends that "there was nevertheless a shifting of economic benefits upon decedent's death occasioned by his death," and petitioners contend that this shifting, upon which alone respondent seeks to justify the tax, was not by virtue of a transfer at decedent's death, but when the estate was created.

5. Of necessity there is a "relinquishment of possession, enjoyment or control" of all that he possessed by decedent on his death, as contended by respondent, for the dead have no title even to their graves, but petitioners contend that a mere "relinquishment" without a transfer is not taxable.

6. The practical result, however, of the dissolution of an estate by the entirety by the death of one spouse is not as claimed by respondent to **transfer** to the surviving spouse an unfettered ownership in fee, even though it is true that after death the surviving spouse has such a fee and that prior to the death of the decedent she did not have it.

7. If, however, this unrestricted fee was not transferred **from** the decedent spouse, and did not belong to him at the time of his death, respondent cannot maintain that it is taxable by the Acts, for by those Acts, only a tax on a transfer is constitutional. The law does not attempt to tax anything which has neither **shifted** to the survivor from nor been trans-

ferred by the decedent by virtue of death, testamentary disposition, or transfer in contemplation of death.

8. It would seem to be axiomatic that one neither living nor dead can transfer that which he has not had control, possession or enjoyment of, and unless decedent had during his life the unfettered fee which his wife did not have before his death, and did have after his death, then that unfettered fee certainly did not shift from him to her, nor was it transferred by him to her, and if petitioners understand respondents' contention it is based on the mere fact that after decedent's death the surviving spouse had this unfettered fee.

9. The authorities on this "several hundred year old estate" are uniform as to what incidents of ownership each spouse has during the continuance of the estate by the entirety. Not one of those authorities gives to either spouse an unfettered fee, but all that is given to either is a right in case of survivorship. On the death of decedent Tyler, his rights incident to survivorship, in the language of Mr. Justice McReynolds in May vs. Heiner, decided April 15, 1929, were "obliterated," and thereafter the surviving spouse had the unfettered fee; but as stated, it was not shifted from the husband or transferred by him at death.

10. Since the decision of the court in Bromley v. McCaughn, 280 U. S., 124, no one can question the constitutionality of a tax upon a gift inter vivos, and petitioners admit that if at the creation of the estate by the entireties there had been on the statute books a gift tax law, Mr. Tyler would have been liable to such a tax, but there was no gift tax enacted until 1924 and the court is concerned here with a death duty and not a gift tax. If the creation of the estate would have subjected the transfer to a gift tax, the trans-

action by virtue of which Mrs. Tyler enjoys the property must necessarily have occurred when the estate was created and could not have occurred at his death.

11. If decedent **had** retained an interest in the estate by the entirety which **had** passed to his wife on his death, his estate would have been liable for a tax on that transfer, but as shown above, what the wife had after decedent's death had never been decedent's from the hour of the creation of the estate by the entirety, and of course it could not have passed from him to her at death because he did not then possess the unfettered fee or anything else which passed to his wife.

12. It is not believed that respondent would maintain that decedent's tax could be measured by the separate property of his wife and that her property could be taken to pay decedent's debt. The unfettered fee of the wife after the death of the decedent was just as much her separate property as if it had come to her by gift from her father, never having belonged to decedent any more than his wife's separate estate belonged to him, and to use it as a measure of decedent's tax, and to take part of this unfettered fee to pay decedent's tax would be arbitrary and capricious. To collect the husband's tax out of a wife's separate estate or out of her property received as surviving tenant by the entireties, as has heretofore been shown, might become necessary in certain instances, would be just as much a taking of property without due process of law as it would be to take John Smith's property to pay decedent's tax.

13. Petitioners agree, as held by the court in Chase National Bank against the United States and urged by respondent, that "the transfer of any property procured through expenditures by decedent with the purpose effected at his death of having it pass to

another" is taxable, but we understand that language to refer to a very different state of facts than we have here. In that case decedent owned during his life certain policies of insurance always subject to his changing the beneficiary and therefore up to the minute of his death subject to his control. This was taxable property, but the decedent Tyler at his death did not own or control this property so as to be able to dispose of it in any way.

14. In Reinecke v. Northern Trust Company, 278 U. S., this court refused to tax the five trusts that had passed out of decedent's control at the date of their creation, but rightfully taxed the two which he alone had the right to control up to his death. On his death, this control of these two, being a most important element of property belonging to him, passed to others without his consent, so that the control at that minute passed from him and was rightly taxed. That is entirely different from the acquisition of the unfettered fee of the wife through which it is here sought to sustain the tax because, as above shown, this unfettered fee never was the property of decedent after the creation of the estate and it could not, therefore, pass to her on his death. Since it was not transferred in any sense, it was not taxable.

15. Respondent seeks to draw an analogy between an estate by the entireties and a power of appointment, but under a power of appointment up to the moment of his death decedent has a valuable right of property which if he exercises by will is of course taxable, but which if he does not exercise nevertheless carries the property, up to his death in his control, and then it passes freed from his control to others. The deceased spouse of an estate by the entireties, as above pointed out, never had anything which passed

to anybody at his death, and whatever the wife had after death was not shifted from the husband because he never had it and it was not transferred by him. As to the husband, it is true his interest in the estate was obliterated, but the law does not seek to tax as part of a man's estate what was not his. It does not seek to reach anything except something that partakes of the characteristics of a testamentary disposition. Just because the wife has something after death that she did not have before death, that can no more be taxed as part of her husband's estate unless it came from him by virtue of his death than, as elsewhere pointed out, could any part of her separate estate be so taxed.

16. On page 19 of the brief, respondent urges that the so-called "legal fiction" that the survivor of an estate by the entireties secures no enlarged interest or right should not necessarily be determinative of questions of federal taxation, and in support of this cites Lucas v. Earle of the 1929 Term, decided by this court March 17, 1930. Even if individuals by contract cannot escape liability for income taxes it is not believed that this court will sweep aside the common law estate by the entireties "preserved in all its purity" as the court says in the Provident Trust Company case, in order to permit the imposition of an unconstitutional tax.

17. On page 20 respondent again fails to recognize that the surviving spouse after the death of the decedent has obtained nothing which decedent ever had or which ever at any time during the continuance of the estate by the entireties could have been transferred by him. It is true that a property interest existed in decedent up to the moment of his death and that at the moment of his death that property interest was

obliterated, but neither at that moment nor because of that event did anything pass from decedent to survivor which survivor had not previously had, and the practical result of the dissolution of an estate by the entireties is not the transfer to the surviving spouse of an unfettered ownership in fee, but the sole practical result is the obliteration of the interest of the decedent in every element of property which during the continuance of the estate he owned, and what is here involved is not legalism but the very substance of property.

18. On page 21 of the brief respondent urges that if decedent had retained this property until his death its value would have been included in the computation of the estate tax and if he had given it to his wife during his lifetime the gift could have been taxed by an act passed before the date of the gift, but neither of these things as has heretofore been pointed out occurred, and admitting of course that the conveyance he made operated as a gift to his wife and as a retention of a certain interest in property in himself the mere cessation of that interest at his death is not a legitimate occasion for a tax, because nothing passed from him to his wife or anyone else.

19. Respondent urges in the third portion of the brief that the tax involved here is properly measured and is neither arbitrary nor capricious, and it is true as claimed by respondent, that petitioners contend that this statute taxes the adverse interests in the property of the co-tenant. It can hardly be contended that regulations of the Treasury Department will be effective to make constitutional what is unconstitutional and it is clear from the decision in the Coolidge case that a tax can be so capricious and arbitrary as to make any moneys collected under it the taking of

property without due process of law, and as has heretofore been pointed out and as shown in petitioners' original brief, if such a tax is sustained a very large part of the surviving spouse's estate might be taken to pay the tax.

If petitioners are right in their analysis of what actually happens, then the decedent, after the estate was created, retained no control over the unfettered fee which sprung into being at his death. True he had a right of survivorship in the whole. True the property was originally procured through an expenditure by him, but long prior to his death he had divested himself of this property and had created the estate by the entireties, in which from the time of its creation his wife had the same right of survivorship as did decedent, but he never retained any measure of dominion and control over the unfettered fee which immediately arose upon the death of either co-tenant. The analogy here is closer to the four trusts in the Reinecke case, in which the settlor and one trustee held a joint control from the date of the creation of the trust. The court held that since the settlor could not sell or otherwise dispose of the property after the creation of these four trusts unless his co-trustee joined with him, the property covered by the four trusts was not taxable. From the date of the creation by decedent Tyler of the estate by the entireties he and his wife had a joint control over this estate just as the settlor and his co-trustee had in the four trusts in the Reinecke case. Decedent and his wife together could have joined in a deed which would have carried the estate by the entireties, including the unfettered fee, but the decedent alone could not by his deed convey any part of the estate during life nor the unfettered fee after his death any more than the settlor alone could have

altered the four trusts in the Reinecke estate. If, therefore, these trusts are not taxable because the control passed out of the settlor at the date of the creation of the estate, then the estate by the entireties in the Tyler case is not taxable because the husband's control of it passed when the estate was created.

It is surprising to find on page 25 of respondent's brief the argument **ad hominem** that if petitioners' contentions are sustained in those states, and there are many of them, in which estates by the entireties still exist, married taxpayers could very generally evade the estate tax law by putting large holdings of property into estates by the entireties. It is not believed that this court solely for saving to the United States certain taxes which it might otherwise lose ought to be asked to take that fact into its consideration in the determination of such important questions as are here involved, and it is not believed that the cases cited by respondent to the effect that a measure may be valid as a necessary adjunct to a matter that lies within legislative power even though standing alone its constitutionality may have been subject to doubt, go to the length of holding that a statute can be used to supersede the Constitution or to bring within the grasp of Congress as an adjunct to legislation by indirection what Congress has not the power to do directly, nor is it believed that the mere threat of the creation of estates by the entireties by taxpayers should be used as an argument.

May it be suggested for the comfort of respondent, if its chief concern is the loss of revenue, that the sale by the survivor of the much discussed unfettered fee after the death of the decedent may bring in such large returns from the gain on the sale as to offset the loss, if any, due to creation of estates by the

entireties, for undoubtedly the basis on which the gain is to be computed would be the value at the date of the creation of the estate and the value at the date of death or at the time of sale may be many times the value at the date of creation.

In further answer to the argument **ad hominem** we suggest the tax is only postponed, for we have all learned that death and taxes cannot be escaped.

It is again respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court should stand.

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